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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID BARBA PLACENCIA,

Defendant and Appellant.

B221107

(Los Angeles County  
Super. Ct. No. LA016713)

APPEAL from an order of the Superior Court of Los Angeles County, Huey P. Cotton, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

David Barba Placencia appeals from the trial court's order denying his motion to vacate his plea and his petition for a writ of error coram nobis. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *Facts.*

On February 21, 1994, Placencia's nine-year-old stepdaughter, R.V.A., reported to police that Placencia had been sexually abusing her. When she made the complaint, R.V.A. was accompanied by her aunt, Ana T. After R.V.A. made the report, police officers went to Placencia's home and took him into custody.

The arrest report indicates R.V.A. stated that Placencia had inserted his finger into her vagina, exposed himself to her and had her touch his penis. This behavior began when R.V.A. was six years old. When R.V.A. was taken to Children's Hospital for a physical examination, the findings of "genital and hymenal trauma" were determined to be consistent with sexual abuse.

### 2. *Procedural history.*

#### a. *1994.*

In a complaint filed on February 23, 1994, Placencia was charged with the crime of "continuous sexual abuse, in violation of Penal Code section 288.5, a [f]elony." It was further alleged that Placencia had "willfully and unlawfully engage[d] in three and more acts of 'substantial sexual conduct,' as defined in Penal Code [s]ection 1203.066[,] [subdivision] (b), and three and more acts in violation of section 288 with [R.V.A.], a child under the age of 14 years, while the defendant resided with, and had recurring access to, the child."

In response to a motion brought by the People, on March 8, 1994, the trial court amended the complaint to allege in count 2 a violation of Penal Code section 288, subdivision (a). That section prohibits the commission of "any lewd or lascivious act, including any of the acts constituting other crimes . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or

the child.” The penalty for a violation of Penal Code section 288, subdivision (a) is “imprisonment in the state prison for three, six, or eight years.”

A preliminary hearing was scheduled for March 8, 1994. Instead, Placencia decided to enter a plea. He was advised of his right to a court or jury trial, his right to confront and cross-examine the witnesses against him, his right to subpoena witnesses and present a defense and his privilege against self-incrimination. In addition, he was told of the “nature of the charges against him, the elements of the offense[s] in the complaint, and possible defenses to such charges[,] [¶] [t]he possible consequences of [entry] of a plea of guilty or nolo contendere, including the maximum penalty and administrative sanctions,” and that, if he were not a citizen, “a conviction of the offense [of] which [he had] been charged [would] have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization . . . .” After being so advised, Placencia pleaded guilty to count 2, a violation of Penal Code section 288, subdivision (a). The trial court found that Placencia had “knowingly, understandingly, and explicitly” waived each of his rights and that there was a factual basis for the plea.

On March 22, 1994, Placencia waived arraignment for judgment and the trial court sentenced him to the lower term of three years in state prison for his violation of Penal Code section 288, subdivision (a). Placencia was awarded presentence custody credit for 29 days actually served and 15 days of good time/work time, or a total of 44 days. The trial court dismissed count 1 “due to plea negotiation[s].”

b. *2009-2010.*

In a declaration dated September 3, 2009, R.V.A. stated that she is now 25 years old and that, when she was a child she accused her stepfather, Placencia, of molesting her. R.V.A. continued, stating, “I told police that he had been touching me and making me do things. This was not true, as my stepfather David Barba Placencia did not molest me or sexually abuse me in any way. The reason I said those things about my stepfather is that I was being led by my mother’s aunt Irma [M.] and her daughter (my cousin), Ana Lilia (‘Lily’) [T.] Ana and Irma wanted to have custody of my brother, Carlos, and I

believe the reason they coached me to lie was to keep Carlos. I lied, although I knew that it was wrong, so that I could stay with my cousin Ana and her family, as they took us places and gave us things. I did not understand what lying would do to my stepfather and my family.”

On September 18, 2009, Placencia, was once again in custody. Represented by a federal public defender, he filed a “Motion to Withdraw and/or Vacate [His 1994] Guilty Plea” or, in the alternative, filed a “Petition for Writ of Error Coram Nobis.” Counsel for Placencia asserted that Placencia (1) was not properly advised of the consequences of his plea and (2) is factually innocent of the charges. Under these circumstances, the issuance of a writ of coram nobis is proper.<sup>1</sup> In a declaration in support of the motion, Placencia stated: “I was charged with lewd act with a child and taken to court. I understood that I would be pleading no contest to the charges. I pleaded in this manner because I was told that if I did not, I could get as much as sixteen years in prison. I was not advised of what a plea pursuant to *People v. West* [(1970) 3 Cal.3d 595] consisted of, or that my plea would be a guilty plea pursuant to that case. I was told that if I took the deal, I would be sentenced to three years in prison and would serve half of that sentence. I accepted the deal because of the potential for such a lengthy prison sentence.” Placencia added: “I was not guilty of the charges, and I did not commit a lewd act upon a child, my stepdaughter [R.V.A.]”

The People filed opposition to Placencia’s motion on November 4, 2009. They asserted that a review of the record indicated Placencia had been advised of the consequences of his no contest plea and that “the facts [did] not support [his] claim that his plea was not knowing and intelligent pursuant to *People v. West*[,] [*supra*, 3 Cal.3d at pp. 600, 604, 608]. Placencia was fully aware of the consequences of his plea prior to and at the time of his plea.” In addition, the People argued that Placencia “may not petition for writ of error coram nobis based upon [R.V.A.’s] recent admission of his

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<sup>1</sup> A writ of coram nobis “asks a court to reform its own judgment due to an error or mistake of fact that did not appear on the face of the record because of fraud, duress, or excusable neglect.” (Statsky, West’s *Legal Thesaurus/Dictionary* (1986) p. 189.)

innocence. Coram nobis is not generally used to retry issues of a case previously determined, but is available merely to declare as false a fact previously decided to be true. [Citation.] Here, Placencia attempts to use [R.V.A.'s] admission that he did not commit the acts to vacate his conviction. This essentially amounts to retrying the already determined issue of whether Placencia did, in fact, molest [R.V.A.]. Therefore, coram nobis is inappropriate here.” In addition, the People asserted that Placencia had not shown that R.V.A.’s retraction of her allegation of molestation “was not known and could not, in the exercise of due diligence, have been discovered at any time substantially earlier than the time of the petition. Placencia attempts to justify the lateness of his petition by claiming he was unable to do so as [R.V.A.] was still a minor, and he was serving time in prison. However, Placencia fails to show how serving prison time prevented the discovery of [R.V.A.’s] testimony as to his innocence, or how [R.V.A.] being a minor necessarily delayed the discovery thereof. Moreover, seven years have passed since [R.V.A.] was a minor, so Placencia may not excuse his tardiness by this reason.” Finally, the People argue that “[m]ost compelling is that the challenge to his conviction is being made 14 years after the fact. Not only is the delay unexplained, . . . Placencia was charged with and convicted of a felony crime of [Penal Code section] 290, failing to register as a sex offender. In [another] case . . . [,] Placencia pleaded guilty/no contest and admitted this case . . . as a prior conviction and enhancement. . . . Placencia did not challenge this conviction in the [Penal Code section] 290 case. In 2003, Placencia was again charged with violating [Penal Code section] 290 . . . . This case was again alleged as a prior . . . conviction. Placencia pleaded no contest and admitted the prior . . . . Once again, Placencia did not try to challenge the validity of this case.”

A hearing was held on the matter on November 12, 2009. At those proceedings, the trial court considered an affidavit filed by R.V.A. in 1994 and the one filed on September 3, 2009. Because R.V.A. was present, the trial court addressed her and stated: “The Court received your declaration, or affidavit, and I understand it as your current view of those past events. [¶] But I have to tell you it’s hard for me to buy into the notion that your original story, which I’ve read in some detail, lacked truthfulness. It just

had an internal consistency to it and youthful honesty to it that your new affidavit doesn't persuade me to disagree with. I just still believe the first version. [¶] So I would really need something substantially more than just your testimony to show something to the contrary. I just—I don't get there with you.” After stating that it had considered the “motion and the arguments of counsel,” the trial court denied Placencia's motion. The court stated: “Both the *coram nobis* and[,] to the extent it is characterized as just a motion to withdraw and vacate [the] guilty plea[,] . . . the motion is denied.”

Placencia filed a timely notice of appeal from the trial court's order on December 14, 2009.

This court appointed counsel to represent Placencia on appeal on March 23, 2010.

### **CONTENTIONS**

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed July 13, 2010, the clerk of this court advised Placencia to submit by August 19, 2010 any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

### **REVIEW ON APPEAL**

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

## **DISPOSITION**

The order denying the motion to vacate the plea and the petition for a writ of error coram nobis is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.